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Settlement of commercial disputes

Possible future work in the field of settlement of commercial disputes: revision of the UNCITRAL Arbitration Rules

Note by the Secretariat

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Introduction

1. At its thirty-sixth (Vienna, 30 June-11 July 2003), thirty-seventh (New York, 14-25 June 2004) and thirty-eighth sessions (Vienna, 4-15 July 2005), the Commission heard proposals that a revision of the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Notes on Organizing Arbitral Proceedings (1996) ("the UNCITRAL Notes") could be considered for inclusion in future work.[1] At the forty-fourth session of the Working Group (New York, 23-27 January 2006), although reservations were expressed as to whether there was an immediate need to revise the UNCITRAL Arbitration Rules, support was expressed for their revision to be taken up as a matter of priority.[2] It was proposed that to better facilitate a review of the UNCITRAL Arbitration Rules, preliminary consultations could be undertaken with practitioners to develop a list of topics on which updating or revision was necessary.[3]

2. At its thirty-eighth session (Vienna, 4-15 July 2005), the Commission was informed that 2006 would mark the thirtieth anniversary of the UNCITRAL Arbitration Rules and that conferences to celebrate that anniversary were expected to be organized in different regions to exchange information on the application and possible areas of revision of the UNCITRAL Arbitration Rules.[4] A conference was held in Vienna on 6 and 7 April 2006 in cooperation with the International Arbitral Centre of the Austrian Federal Economic Chamber. Suggestions were made to amend a number of articles of the UNCITRAL Arbitration Rules in order to better align the Rules with current international arbitration practice and the relevant provisions of the UNCITRAL Model Law on International Commercial Arbitration ("the Model Law"). To facilitate discussions of the Commission on that topic, this note contains a brief overview of some suggestions made by practitioners during that conference. Such an overview shall not be regarded as an exhaustive list of topics to be considered by the Commission. Should the Commission decide that a revision of the UNCITRAL Arbitration Rules should be considered by Working Group II (Arbitration), a more detailed annotated list of possible areas of revision could be presented by the Secretariat to the Working Group at its next session to assist it in considering the areas of possible revision and the policies to be adopted in revising the Rules.

Suggestions for a revision of the UNCITRAL Arbitration Rules

Multiparty arbitration

3. When a single arbitration involves more than two parties (multi-party arbitration), proceedings can be more complicated to manage and rules of various arbitration institutions have been amended so as to accommodate multi-party arbitration.[5] Amendments to the UNCITRAL Arbitration Rules could be considered to address that situation. The areas of possibly increased complexity in multi-party arbitration are listed in the UNCITRAL Notes.[6]

Consolidation of cases before arbitral tribunals

4. In situations where several distinct disputes arise between the same parties under separate contracts (e.g., related contracts or a chain of contracts) containing

separate arbitration clauses, one of the parties might refuse that all such disputes be resolved in the same proceedings. A party might also initiate a separate arbitration in respect of a distinct claim under the same contract in order to gain a tactical advantage. Consolidation in such situations might provide a more efficient resolution of the disputes between the parties and also reduce the possibility of inconsistent awards in parallel arbitrations. Under the UNCITRAL Arbitration Rules, consolidation is possible only where the parties specifically so agree.[7]

Truncated arbitral tribunals and obstructing arbitrators

5. A review of the UNCITRAL Arbitration Rules might address the situation where the arbitral tribunal decides to proceed with the arbitration notwithstanding the absence in bad faith of one of its members or where the arbitral tribunal considers that one of its members is obstructing the progress of the case, including the arbitral tribunal's deliberations.[8] The Commission might wish to discuss the potential detrimental consequences of bad-faith withdrawals of arbitrators from arbitral proceedings on the practice of international commercial arbitration and, in that context, consider the extent to which the parties should be able, by agreement, to put beyond doubt the validity of an award issued by a truncated arbitral tribunal.[9]

Confidentiality of information in arbitral proceedings

6. Articles 25, paragraph (4), and 32, paragraph (5), of the UNCITRAL Arbitration Rules deal with the confidentiality of hearings and awards respectively, but there are no rules regarding the confidentiality of the proceedings as such, or of the materials (including pleadings) before the arbitral tribunal. A suggestion was made that an explicit provision to that effect be included in a revised version of the UNCITRAL Arbitration Rules.

Interim measures

7. Article 26 of the UNCITRAL Arbitration Rules, which deals with interim measures is not consistent with the revised model legislative provisions on interim measures proposed to be inserted under a new chapter IV bis of the Model Law and scheduled for adoption by the Commission at its thirty-ninth session.[10] The question to be considered is whether, and if so, to what extent, article 26 should mirror the revised legislative provisions on interim measures of the Model Law.

Liability of arbitrators

8. The Commission might wish to consider whether the question of liability of arbitrators needs to be further examined in the context of the UNCITRAL Arbitration Rules. At present, neither the UNCITRAL Arbitration Rules or the Model Law address that question.[11]

Raising claims for the purpose of set-off

9. The UNCITRAL Arbitration Rules provide that the respondent may rely on a claim for the purpose of a set-off if the claim arises out of the same contract (article 19). Views have been expressed that the arbitral tribunal's competence to consider claims by way of a set-off should, under certain conditions, extend beyond

the contract from which the principal claim arises. The reasons cited are procedural efficiency and the desirability of eliminating disputes between the parties.[12]

Third-party intervention in arbitral proceedings

10. Third parties, for example non-governmental organizations, often ask for an opportunity to explain their positions, particularly in investment treaty arbitrations. Article 15, paragraph (1), of the UNCITRAL Arbitration Rules, providing that "the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate", could be interpreted as conferring power on the arbitral tribunal to accept *amicus curiae* briefs in written form. The Commission might wish to consider whether an express provision on third-party intervention should be included in any revised version of the UNCITRAL Arbitration Rules.

Other suggestions

11. Article 3 of the UNCITRAL Arbitration Rules requires the claimant's notice of arbitration to indicate the "general nature" of its claim as well as the "remedy or relief sought". Thereafter, the arbitral tribunal is constituted without the respondent having an opportunity (or being required) to state its position with respect to (i) jurisdiction, (ii) the claim, or (iii) any counterclaim. In order to promote a more streamlined efficient arbitral procedure, article 3 might be modified to include provision permitting the respondent to submit a response to the claimant's notice of arbitration.

12. Article 35 of the UNCITRAL Arbitration Rules currently provides that either party might request the arbitral tribunal to give an interpretation of the award. The question raised was whether that provision should only apply where there is a dispute as to what the award orders the parties to do.

13. Article 39, paragraph (1), of the UNCITRAL Arbitration Rules provides that fees be "reasonable in amount". The Commission might wish to consider whether more guidance on that question should be included in any revision of the UNCITRAL Arbitration Rules.

Notes

[1] *Official Records of the General Assembly, Fifty-eighth Session, Supplement No. 17* (A/58/17), para. 204; ibid., *Fifty-ninth Session, Supplement No. 17* (A/59/17), para. 60; ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 178; A/CN.9/573, para. 100; A/CN.9/592, paras. 90 and 93.

[2] A/CN.9/592, para. 93.

[3] Ibid.

[4] Ibid., *Sixtieth Session, Supplement No. 17* (A/60/17), para. 179.

[5] For instance, the ICC Rules (article 10), the LCIA Rules (article 8.1), and the WIPO Rules (article 18).

[6] UNCITRAL Notes on Organizing Arbitral Proceedings, paras. 86-88.

[7] Article 19 (3) of the UNCITRAL Arbitration Rules states that the respondent can bring a counter claim arising out of the same contract.

[8] In that respect, article 13 of the UNCITRAL Arbitration Rules deals with substitute arbitrators; and article 32, paragraph (4), of the UNCITRAL Arbitration Rules requires the majority of the tribunal to state the reasons for the absence of one arbitrator's signature from an award.

[9] A/CN.9/460, paras. 80-91.

[10] A/CN.9/592, annex I.

[11] A/CN.9/460, paras 92-100.

[12] A/CN.9/460, paras. 72-79.